STATE OF MICHIGAN

COURT OF APPEALS

CINCINNATI INSURANCE COMPANY,

Plaintiff-Appellant,

v

MYRON HALL, as guardian of KELLY FOSTER HALL, SOCIAL RESOURCES, INC., and MICHAEL W. DAVIS,

Defendants-Appellees,

and

MACOMB COUNTY COMMUNITY MENTAL HEALTH,

Defendant.

UNPUBLISHED
June 20, 2013

No. 308002
Macomb Circuit Court
LC No. 09-001032-CZ

Before: JANSEN, P.J., and FITZGERALD and K. F. KELLY, JJ.

FITZGERALD, J. (*dissenting*.)

I respectfully dissent from the majority's conclusion that the trial court erred in finding that the policy of insurance was illusory. I would affirm.

In the prior appeal,[1] this Court addressed whether the "abuse or molestation" exclusion in the insurance policy operated to exclude coverage for the claim made on behalf of Kelly Foster Hall (Kelly). This Court, noting that the insurance policy did not define the terms "abuse" or "molestation," applied the dictionary definitions of the terms and concluded that "Egbuche's actions toward Hall could be considered "treatment in an injurious way," constituting "abuse;" and "bothering, interfering with, or annoying," constituting "molestation." This Court rejected the trial court's conclusion that the exclusion only applied to claims of sexual abuse or molestation. This Court stated:

[1] *Cincinnati Ins Co v Hall*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2011 (Docket No. 297600).

> Although these [foreign] jurisdictions all interpreted "abuse or molestation" as *including* unwanted or inappropriate sexual behavior, none of them held that sexual behavior was *required*. These cases merely dealt with allegations that were of a sexual nature and found those allegations to fall within the range of possible actions that would constitute "abuse or molestation." Further, these cases explained that words are not ambiguous simply because they might have several possible definitions, the Supreme Court of Connecticut explicitly stating that "[w]hatever other conduct that broad language may include within its purview, it certainly includes unwanted contact of a sexual nature." *Community Action*, 254 Conn at 401. Again, there is no reason why "abuse" or "molestation" *must* be sexual in nature. The actions alleged in the instant case clearly fall into the definitions of "abuse" and "molestation." Therefore, the policy excluded from its coverage the conduct alleged in Hall's complaint, and the defendant [Cincinnati] had no duty to defend the plaintiff [SRI].
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> As *Community Action* explained, unwanted sexual contact might be what "abuse or molestation" is most commonly used to describe. However, the plain meanings of the words encompass a broader range of possible actions and behaviors, and we find no authority requiring their use in an insurance policy to be artificially restricted to only sexual acts or behaviors.

Despite this conclusion, this Court went on to state:

> We are nonetheless troubled by this outcome, because this plain reading of the "abuse or molestation" exclusion seems to suggest that the policy may well exclude everything. We agree with Hall's general assertion that insurance policies must insure against *something*. It defies all sense to conclude that an insured would pay for an insurance policy that turns out to be an empty work of fiction, and indeed, such a policy might even be considered fraudulent. If the literal application of the plain meaning of the "abuse or molestation" exclusion operates to totally eviscerate the policy, then the policy *must* be ambiguous, and the trial court may then engage in interpreting it to address that ambiguity. However, that evaluation should be undertaken by the trial court.

On remand, the trial court was instructed to evaluate whether the exclusion for "abuse or molestation" was ambiguous and whether that exclusion was so broad that it would operate to exclude any potential claim, thereby rendering the entire policy illusory. Following a hearing on remand, the trial court granted summary disposition in favor of defendant Social Resources, Inc. (SRI). The court concluded that the abuse or molestation exclusion was "too broad . . . too vague" and that the exclusion "could be construed in such a fashion as to exclude virtually any activity." The Court stated, "I'm satisfied that the term is, as written, at least ambiguous but at the most would be illusory as a result of the - - the contract would [be] illusory as a result of it, and I'm going to let you take it back to the Court of Appeals and let them give you their final analysis."

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Copus v MEEMIC Ins Co*, 291 Mich App 593, 596; 805 NW2d 623 (2011). A motion under

MCR 2.116(C)(10) tests the factual support for a claim based on substantively admissible evidence. MCR 2.116(G)(6); *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55–56; 744 NW2d 174 (2007). In reviewing the motion, a court considers the pleadings, depositions, affidavits, admissions, and other documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(5); *Healing Place at North Oakland Med Ctr*, 277 Mich App at 56. A court should grant the motion if the evidence, viewed in a light most favorable to the nonmoving party, fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424–425; 751 NW2d 8 (2008).

The construction and interpretation of an insurance contract is also a question of law that this Court reviews de novo. *Citizens Ins Co v Pro–Seal Serv Group, Inc*, 477 Mich 75, 80; 730 NW2d 682 (2007); *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). Summary disposition under MCR 2.116(C)(10) is appropriate in a case involving a contract dispute where the terms of the insurance policy are unambiguous. *Henderson*, 460 Mich at 353.

In the prior appeal, this Court, after examining the dictionary definitions of the undefined terms "abuse" and "molestation" determined that the actions alleged in the instant case clearly fall within the plain meaning of the exclusion for "abuse" and "molestation." Thus, this Court determined that the exclusion was not ambiguous and that Cincinnati did not have a duty to defend and indemnify in this case. Consequently, the appropriate question on remand was whether the policy is illusory in light of this Court's interpretation of the definition of "abuse or molestation." This Court stated with regard to the definition of "abuse" and "molestation":

> Both "abuse" and "molestation" have multiple possible definitions that include, but are not limited to, those which involve a sexual connotation. The Random House Webster's College Dictionary defines the verb "abuse" as "to use wrongly or improperly," "to treat in a harmful or injurious way," "to speak insultingly or harshly about," and "to commit sexual assault on." *Random House Webster's College Dictionary* (2001). This demonstrates that abuse need not be "sexual." The same dictionary defines "molest" as "to bother, interfere with, or annoy," "to make indecent sexual advances to," and "to assault sexually." *Id*. This likewise demonstrates that molestation need not be sexual. Therefore, according to dictionary definitions of the terms[,] Egbuche's actions toward [Kelly] could be considered "treatment in an injurious way," constituting "abuse;" and "bothering, interfering with, or annoying," constituting "molestation."

The commercial general liability insurance policy in this case provided coverage for "those sums that the insured becomes legally obligated to pay because of "bodily injury" or "property damage" to which this insurance applies. The policy further provided that the insurance "applies to "bodily injury" and "property damage" only if the "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory." An occurrence is defined as "an accident, including continuous or repeated exposure to substantially the same the same general harmful conditions." As relevant to this case, the policy provides an exclusion to coverage for "abuse or molestation." This exclusion provides that "This insurance

does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of:

> 1. The actual or threatened abuse or molestation of any person while in the care, custody, or control of any insured, or
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> 2. The negligent
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> a. Employment'
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> b. Investigation;
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> c. Supervision;
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> d. Reporting to the proper authorities, or failure to so report; or
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> e. Retention;
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> of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1. above.

Cincinnati argues that the trial court erred by concluding that the insurance policy coverage was illusory because negligent acts (i.e., unintentional acts) resulting in bodily injury or property damage are clearly covered by the policy. It contends that "there is a wide spectrum of potential claims that could be made under the policy for "occurrences" arising from Social Resources' business operations" and that the abuse or molestation exclusion operates to preclude coverage only for a narrow set of claims that do not arise accidentally. SRI disagrees, asserting that the definition of "abuse" or "molestation" in the exclusion *as interpreted by this Court* includes "injurious acts" and, because bodily injury and property damage necessarily result from an injurious act, the liability portion of the policy only offers illusory coverage because coverage for virtually any negligent act could be excluded on the basis of the "abuse or molestation" exclusion. That is, SRI argues that conduct that may seem merely accidental or negligent is always going to be injurious if it results in bodily injury or property damage and that it is hard to imagine exactly what insureds are insured for if most negligent acts could be excluded by Cincinnati under its abuse or molestation exclusion.[2]

[2] In my view, in the previous appeal this Court should have rejected the broad dictionary definitions and interpreted the exclusions within the context of the insurance policy because the literal dictionary definitions lead to unreasonable results and broaden the exclusion as to make coverage illusory. Indeed, a contract should be read as a whole, with meaning given to all the terms, to determine the intent of the parties, *Wilkie v Auto–Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003), and construed in context, *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 516; 773 NW2d 758 (2009). Further, exclusionary clauses in insurance policies are strictly construed in favor of the insured. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566-567; 489 NW2d 431 (1992).

An illusory contract has been defined as "one where a premium was paid for coverage which will not pay benefits under any reasonably expected set of circumstances." *Ile v Foremost Ins Co*, 293 Mich App 309, 322; 809 NW2d 617 (2011), reversed on other grounds 493 Mich 915; 823 NW2d 426 (2012). This Court has concluded in this case that the policy definition of "abuse" is "to use wrongly or improperly," "to treat in a harmful or injurious way," "to speak insultingly or harshly about," and "to commit sexual assault on," and that the definition of "molestation" is "to bother, interfere with, or annoy," "to make indecent sexual advances to," and "to assault sexually." Applying these broad definitions, the trial court on remand concluded that the definition "could be construed in such a fashion as to exclude virtually any activity." Inasmuch as this Court is bound the prior panel's opinion, I agree. Both bodily injury and property damage require an injury to person or property, and because this Court has defined "abuse" to include "treatment in a harmful or injurious way [to person or property]," any act that results in injury would arguably be encompassed within the definition of "abuse" and would exclude every potential claim under any reasonable set of circumstances.[3] The doctrine of illusory coverage constitutes a valid defense to the enforceability of a contract and serves as an exception to the requirement that an unambiguous contract be enforced as written. *Ile*, 293 Mich App at 329-330. I would affirm.

/s/ E. Thomas Fitzgerald

[3] Using Cincinnati's example of an SRI driver who accidentally drops and injures a consumer as he was helping the consumer exit the vehicle, although the driver's acts would clearly be unintentional (and therefore "covered" according to Cincinnati), the driver's acts would also be "treatment in an injurious way," and therefore excluded under the abuse or molestation exclusion as interpreted by this Court. Cincinnati's assertion that the exclusion operates to preclude coverage for only a narrow and well defined set of claims that do not arise accidentally, although arguably the intent of the policy, is not persuasive in light of this Court's holding regarding the definition of "abuse" or "molestation."